

rates, terms or conditions governing access by an ILEC to the poles, ducts, conduit or rights-of-way of another utility.^{56/}

In spite of this plain statutory prohibition and the Commission's interpretation of this prohibition, USTA argued that without the benefit of the Pole Attachments Act, ILECs will be "severely disadvantaged in their ability to compete fairly."^{57/} According to USTA, the median attachment rate paid by an ILEC to an electric utility ranges anywhere from 111% to nearly 400% greater than the median of what the ILEC charges non-utility telecommunications service providers to attach to its poles.^{58/}

Although USTA has identified correctly the inefficiency, namely the disparity between market-negotiated rates available to some attachers and the current regulated rate available to others, it has suggested a solution that plainly violates § 224(a)(5). The Electric Utilities agree that the disparity between market-negotiated rates and the current regulated rate is problematic. However, as the Electric Utilities argued in their Comments, in light of the statutory language, the only way to resolve this disparity is for the Commission to adopt a rate methodology that brings the regulated rate more in line with a market-negotiated rate.^{59/}

^{56/} Local Competition Order, ¶ 1231.

^{57/} Comments of the United States Telephone Association at 13.

^{58/} Id. at 13.

^{59/} Comments of AEP, et. al. at Section IV.A.2.

V. State And Municipal Laws Governing The Placement Of Telecommunications And Cable Facilities Are Irrelevant To The Determination Of Just And Reasonable Pole And Conduit Attachment Rate Formulas

AT&T argues that because state and local regulations establish guidelines that govern when and where wireline telecommunications and cable facilities may be placed,^{60/} the Commission must retain its current approach for calculating pole attachment rates.^{61/} The existence of such regulations is irrelevant to the FCC's formulation of rate methodologies for access to a utility's distribution poles and conduit. To the extent that states or localities have enacted laws that dictate the terms and conditions for placing telecommunications or cable facilities in their jurisdictions, the Commission's consideration of the existence of such laws may be proper in matters involving access to a utility's poles or conduit, but not in matters involving pole attachment rates.

Furthermore, many state and local laws that establish the terms and conditions for placing telecommunications and cable facilities also apply to the placement of electric utility poles, ducts and conduit. For example, just as cable and telecommunications companies may face state and local limits on such activities as digging up streets or blocking traffic, the electric utilities may be subject to the same laws. Therefore, the Commission can not base its rate decision on a mistaken belief that attaching entities uniquely face certain

^{60/} AT&T appears to be discussing state and local laws that limit such activities as tower and antenna sitings or access to public rights-of-ways. If this is the case, the Commission must understand that utilities also must seek traffic, construction and other permits in order to construct conduit systems, place poles or run conductors.

^{61/} Comments of AT&T Corporation at 3.

inconveniences or limitations in their ability to place their facilities.^{62/} Because electric utilities are subject to many of the same state and local laws when building their own distribution infrastructure, it would be arbitrary and capricious for the Commission to implement a rate formula that favors attaching entities over electric utilities due to the existence of such laws. As such, AT&T's proposal must be rejected.

VI. The Commission Is Not Bound By Past Pole Attachment Decisions At The State Or Federal Level

NCTA argues that the Commission cannot change its current rate formula because the formula has been in use for 20 years, states have based their own laws on the federal program and the parties to pole attachment agreements have come to rely on the current approach.^{63/} Retaining the status quo is not a valid justification for rejecting the modifications to the pole formula suggested by the Electric Utilities, especially when the proposed changes will lead to more accurate rate calculations with minimal change to current Commission procedures.^{64/}

^{62/} The Commission must also bear in mind that utility infrastructure is limited. Therefore, it is critical that the Commission adopt a rate methodology that encourages the efficient use of this resource. See Comments of AEP, et. al. at V.B. The fact that states and municipalities are adopting laws that make it more difficult for all parties to use public rights-of-way provides additional evidence that the Commission must adopt a rate methodology that does not lead to a misallocation of pole and conduit capacity.

^{63/} Comments of National Cable Television Association at 6-7.

^{64/} The Commission has recognized as a fundamental proposition that greater accuracy in the attachment rate is both a desirable and an important goal. See e.g. Memorandum Opinion and Order on Reconsideration, 4 F.C.C. Rcd. 468 (1989) (stating that the pole attachment rate is to be as closely related to actual costs to the utility as is reasonable).

The Electric Utilities are not proposing sweeping changes to the current formula. Attaching entities and the utilities will not be inconvenienced or confused by changing 37'6" to 40 feet or by moving the 40 inch safety space to unusable space. States will have the choice of adopting similar changes themselves. In addition, because the approaches adopted by the Commission and states already vary, attaching entities cannot in good faith argue that any changes to the Commission's approach will adversely impact the states, utilities or the attaching entities. All three groups are already having to adapt their procedures to accommodate existing differences.

In fact, it is ludicrous to argue that the Commission's adoption of the proposed changes to the current formula will inconvenience states in the least. Many states are guided by the Commission's approach to calculating pole attachment rates, but these same states make their own factual determinations about the actual elements included in their individual rate formulas. For example, SBC Communications Inc. points out that California requires 72 inches of safety space between communications facilities and electric conductors.^{65/} This indicates that the states do not feel bound by how the Commission implements its own pole attachment rate formula.

The Electric Utilities have proposed modifications to the current pole attachment formula and its underlying assumptions because the elements currently included in the formula do not completely or accurately allow electric utilities to recover the costs incurred by them to provide telecommunications carriers and cable system operators with access to

^{65/} Comments of SBC Communications Inc. at n.50; See also Comments of the Electric Utilities Coalition at n.42.

electric utility poles and conduit systems. Considering that some of the elements relied on currently by the Commission were adopted twenty years ago, it is not surprising that things have changed. The Commission, therefore, cannot reject the proposals of the Electric Utilities that would lead to more accurate rates based on the argument that the Commission, states, utilities and attaching entities are in the habit of using the current approach.

VII. The Modifications To The Pole Attachment Rate Formula Proposed By The Electric Utilities Will Improve Pole Attachment Rate Parity

NCTA has raised the argument that rural cable companies and their subscribers are particularly sensitive to pole attachment rates.^{66/} As a result, NCTA states that it is critical

^{66/} Comments of National Cable Television Association at 5. For instance, NCTA claims that rural cable companies may need access to 30 poles in order to provide service to 10 rural subscribers. Industry statistics do not support this claim. Using the statistics reported in the 1997 Edition of the Television & Cable Factbook for a cross section of towns in Virginia with TV Market Ratings of under 100, it is clear that the number of poles per basic service subscriber in a rural community is not as significant as NCTA suggests. On average, an electric utility deploys 25 poles per mile. If this average is multiplied by the miles of coaxial cable and fiber deployed in a rural community and then divided by the number of basic service subscribers, it is possible to estimate the number of poles per subscriber.

Poles Per Subscriber	<u>Miles of Conduit and Fiber X 25 Poles Per Mile</u> Number of Basic Service Subscribers
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Applying this formula to the statistics for small markets reported in the 1997 Factbook, Bland County, VA has .44 poles per subscriber, Harrisburg, VA has .55 poles per subscriber and Richlands, VA has .65 poles per subscriber. By comparison, Fairfax County, VA has .46 poles per subscriber, Manassas, VA has .46 poles per subscriber and Loudon County, VA has .60 poles per subscriber. Even if the Commission assumes that ten percent of the cable in these communities is underground (a generous assumption for rural communities), the poles per basic service subscriber remains fairly low.

that the rates charged for such attachments be kept to a minimum. This argument is a red herring for the reasons cited by the Small Cable Business Association.^{67/} To the extent that a cable company is serving a rural area, it is likely that the cable company is dealing with a utility that is not subject to § 224. If NCTA is truly concerned about the treatment of small cable companies, a fair solution is to adopt the modifications proposed by the Electric Utilities that will bring the pole attachment rates of utilities subject to § 224 closer to the rates charged by pole owners that are not subject to the Pole Attachments Act.

VIII. Attaching Entities Do Not Have Any Ownership Rights To A Utility Pole

AT&T claims that attaching entities pay for the use of vertical space on a pole and, therefore, are free to use that space as they wish.^{68/} This theory is without merit, as AT&T's proposal is akin to asserting ownership rights in the pole.

When Congress enacted the Pole Attachments Act, it intended that pole attachments include only wire attachments on utility distribution poles.^{69/} It also intended that utilities be compensated by attaching entities for the use of a pole. In return, the attaching entity is given the limited ability to attach cables to the pole only with the permission of the pole

The Electric Utilities do not doubt that some communities experience greater efficiencies than others with respect to the average number of poles to which they must attach to deliver service. However, the information provided above demonstrates that rural communities are not being burdened at a level to justify an artificially low pole attachment rate.

^{67/} See Comments of Small Cable Business Association.

^{68/} Comments of AT&T Corporation at 5.

^{69/} See infra discussion at Section XVIII.

owner and subject to safety and engineering guidelines. There is no property right granted in the space occupied on the pole.

To allow an attaching entity to indiscriminately attach wires or other equipment to a pole poses several problems. For example, the integrity of the pole can be jeopardized because the attacher may not take into account capacity limits on the pole.^{70/} Unfettered access can also lead to the placement of facilities in violation of the NESC or in a manner that would limit safe and easy access to pole attachments.

Furthermore, if the Commission grants attaching entities unlimited discretion to attach multiple facilities or equipment to a pole without the permission of, or compensation to, the utility, the next attaching entity that wishes to attach to the pole may believe that there is usable space available, but there may not be pole capacity available. As a result, due to current engineering standards, the utility would be required to have the new attaching entity replace the existing pole with a larger pole. This is because every attachment takes up pole capacity and thus limits the amount of pole space available to other attaching entities.^{71/}

IX. The Costs Associated With Attaching To A Utility Pole Should Be Allocated Based On The Pole Capacity Utilized By The Attaching Entity

In their Comments, the Electric Utilities provided the Commission with a detailed explanation of how poles have limited capacity.^{72/} This discussion was included because

^{70/} The effects of ice, wind and other environmental factors on the capacity of a pole were discussed in detail in the comments filed by the Electric Utilities. Comments of AEP et. al. at Section VIII.H.

^{71/} Id.

^{72/} Comments of AEP et. al. at Section VIII.H.

the Electric Utilities believe that the Commission's current approach to regulating pole attachments does not take adequate notice of the safety and engineering issues that will arise as more attaching entities seek access to utility poles. Now that the Electric Utilities have had an opportunity to review the comments of other parties to this rulemaking, they would like to point out to the Commission that many of the issues regarding the allocation of space on a pole discussed in the comments filed in this proceeding could be easily resolved with a pole formula that allocates costs based on the pole capacity utilized by an attaching entity. The Electric Utilities believe that such an approach is superior to the current allocation method for two reasons.

First, capacity-based cost allocation rewards the efficient use of the pole and may actually lead to a greater number of attaching entities being accommodated on a pole. All parties will be given an incentive to deploy practices and technologies that reduce the amount of capacity used on a given pole. They will also be given the incentive to take obsolete facilities off of poles.

These behavioral changes will help to eliminate a problem that disproportionately affects new entrants. More specifically, new entrants seeking space on a pole will more likely be the parties that will be forced to incur make-ready charges to place a taller pole due to the inefficient use of the existing pole by prior attaching entities. As demonstrated by AT&T, this is because attaching entities already on the pole believe that they have complete freedom to add facilities, through such practices as overlashing, without being required to

pay the pole owner for the use of the additional capacity and with little accountability for safety or the integrity of the pole.^{73/}

Second, the use of occupied capacity to determine the percentage of cost that a given attaching entity should bear is competitively neutral. The Commission is no longer making allocation distinctions based on the nature of the attacher. Instead, each attaching entity would pay an attachment fee based on the amount of the pole's capacity actually used by the attacher. Thus, if a telecommunications attacher is using less than 7.41% of the pole's capacity, then it would pay for what it is actually using.

Considering that a pole has limits on how much load it can bear, if the Commission intends to facilitate competition, it must adopt pole attachment rates and policies that will contribute to pole space being available to all interested parties. This will only be possible if all parties are required to share in the cost of attaching to the pole based on the proportion of pole capacity actually occupied.

X. The Regulatory Treatment Of Thirty Foot Poles Owned And Used By Electric Utilities May Need To Differ From The Treatment Of Thirty Foot Poles Owned Or Used Solely By Non-Electric Utilities

Sprint and other commentors suggest that 30-foot poles must not be excluded from the calculation of a pole attachment rate because there are numerous 30-foot poles in place that can, and currently do, accommodate multiple attachments.^{74/} While telephone utility

^{73/} Comments of AT&T Corporation at 8.

^{74/} See, e.g., Comments of MCI Telecommunications Corporation at 12; Comments of SBC Communications Inc. at 38; Comments of Sprint Corporation at 4; Comments of United States Telephone Association at 27.

poles may be able to accommodate multiple attachments, this is generally not the case for 30-foot poles used by electric utilities. As a result, the Electric Utilities urge the Commission to allow pole owners with the ability to identify information about the costs associated with their 30-foot distribution poles to have the option of relying on the separate rate formula proposed by the Electric Utilities in their Comments, to be allowed to separate 30-foot poles from FERC Account 364 and to recalculate the amount of usable space on 30-foot poles.^{75/}

A. The Electric Utilities Bear A Disproportionate Amount Of The Costs Associated With The Use Of 30-Foot Poles By Attaching Entities

There is a difference in the amount of space available on 30-foot poles with an electric conductor attachment and those that only have telecommunications and cable attachments.^{76/} A 30-foot pole with an electric conductor only has two feet of usable space.^{77/} However, attaching entities pay 7.41% of the costs associated with a 30-foot pole, instead of 50%, based on the incorrect assumption that such poles have 13'6" of usable space and that the attaching entity occupies 1 foot of space. As a result, an electric utility disproportionately bears 92.59% of the cost of a 30-foot pole.

In addition, 30-foot telephone poles without an electric conductor attachment have 5'4" of usable space.^{78/} Again, by paying the telephone utility only 7.41%, instead of

^{75/} Comments of AEP et. al. at Section VIII.C.3. The Electric Utilities believe that any utility should be allowed to utilize this alternative formula so long as the utility is able to separate its pole data.

^{76/} See Exhibit 1.

^{77/} This is calculated as follows: 30' - 5' below ground - 19'8" ground clearance - 40" safety space = 24" or 2'.

^{78/} See Exhibit 1. This is calculated as follows: 30' - 5' below ground - 19'8" ground clearance = 64" or 5'4".

18.75%, of the costs associated with a 30-foot pole, the attaching entities are paying less than their fair share as required by the fact that the attaching entity is using one foot out of 5'4" of usable space. However, the telephone utility is losing less money than an electric utility based on the proportion of usable space actually occupied by the attacher.^{79/} As is obvious, the current formula leads to disparate treatment between electric and telephone utilities that must be addressed by the Commission in this rate rulemaking.

B. The Electric Utilities Have The Ability To Identify And Separate Information About Their 30-Foot Poles

GTE states that telephone utilities generally lack the ability to provide separate information about 30-foot poles, therefore, such utilities would have difficulty implementing the proposals set forth in the Whitepaper regarding the rate treatment of such poles.^{80/} However, the Electric Utilities' proposal is that any adjustments to the pole attachment formula regarding 30-foot poles should be applied at the option of utilities with the ability to identify and separate information about 30-foot poles.^{81/} The fact that some utilities cannot separate the information does not provide an adequate basis for the Commission to deny the request of the Electric Utilities, especially when the Electric Utilities are harmed under the current rate scheme.

^{79/} Telephone utilities should be allowed to recover 18.75% of the cost of a 30-foot pole from an attaching entity, but they are recovering only 7.41%, for a loss of 11.34%. Electric utilities should be allowed to recover 50% of the cost of a 30-foot pole from an attaching entity, but are only recovering 7.41%, for a loss of 42.59%.

^{80/} Comments of GTE Service Corporation at 13. It should be noted that US WEST seems to suggest that it does have the ability to identify information about its 30-foot pole population. Comments of US WEST, Inc. at 4. See also Comments of United States Telephone Association at 29.

^{81/} Comments of AEP et. al. at Section VIII.C.3.a.

XI. Average Pole Height Has Increased, While The Amount Of Usable Space Must Be Reduced

NCTA states that while pole height has increased, that it is "inherently self-contradictory" to simultaneously claim that usable space has decreased.^{82/} The Electric Utilities agree that, at first glance, it is counter-intuitive to encounter the situation where the average height of a pole has increased to 40 feet and yet the amount of usable space available on a pole has decreased. But this is, in fact, the case because the original allocation of space on a pole was based on assumptions that can no longer be said to be true.

More specifically, as discussed in the comments filed by the Electric Utilities in this rulemaking, there are two flaws in the Commission's current formula. First, the current formula fails to take into account that, in order to meet mid-span ground clearance standards, attaching entities must attach their facilities to a pole at 19'8", not 18 feet.^{83/} Second, the 40 inch safety space must be classified as unusable space.^{84/} Correcting these errors causes a decrease in the amount of usable space available on a 40-foot pole.

XII. The Average Height Of An Electric Utility Pole Has Increased To 40 Feet

Contrary to the comments of MCI, the Electric Utilities have experienced an increase in pole height.^{85/} FPL has seen a fairly steady percentage of 40-foot poles added to their

^{82/} Comments of the National Cable Television Association at 9.

^{83/} Comments of AEP et. al. at Section VIII.C.2.a.

^{84/} Id. at Section VIII.C.2.a.i; See infra discussion at Section XIII.

^{85/} Comments of MCI Telecommunications Corporation at 2-5.

service area, with the number of 45-foot poles added increasing over the last ten years.^{86/} The number of 30 and 35-foot poles added has gone down over the last ten years.^{87/} The end result of the trends depicted in Attachment 2 is that, as of 1990, the average height of a new pole entering FPL's pole population is over 40 feet.^{88/} The other electric utilities participating in these reply comments have experienced a similar trend.^{89/}

In addition, MCI argues that the primary reason for any increase in the average height of utility poles is the result of an increase in the demand for electric services.^{90/} The Electric Utilities maintain that the reason for the overall increase in the average height of a

^{86/} See Exhibit 2.

^{87/} Id.

^{88/} See Exhibit 3.

^{89/} See also Comments of Public Service Company of New Mexico at 6; Comments of Time Warner Cable at 9. In its comments, NCTA provides information from a study involving electric utilities in Michigan and New York that shows that the average height of a pole for three major electric utilities operating in these states is 40.17 feet. Comments of National Cable Television Association at 10.

^{90/} Comments of MCI Telecommunications Inc. at 2-5. See also Comments of National Cable Television Association at 10. It should be noted that NCTA bases its statement on the opinion of a witness testifying on behalf of a state cable association. The opinion of one individual given in an unrelated proceeding is not adequate evidence of what motivates an entire industry to place taller poles.

NCTA goes on to say that as the voltage increases on a wire, the wire must be placed a greater distance from the ground. Comments of National Cable Television Association at 10. The Electric Utilities believe this argument is irrelevant because it misstates the facts. Ground clearance for distribution voltage phase to ground from 750 V to 22 kV (the equivalent of over 38 kV phase to phase) does not increase pursuant to NESC Table 232-1. All distribution system conductor in this range of voltages must have the same level of ground clearance along and across roadways. Therefore, an increase in distribution voltage will not generally require an electric utility to raise its attachment on a pole to meet the clearance requirements set forth in NESC Table 232-1.

pole is not relevant to the decision as to whether the average height of a pole should be changed in the rate formula. It is enough that average pole height has, in fact, increased. However, in order to ensure that the Commission is not persuaded by information that is incorrect, the Electric Utilities wish to address the rationale provided by commenting parties for why electric utilities are deploying taller poles.

When electric utilities design their distribution systems, they do so using plans that take into account such factors as NESC guidelines, future projections for electricity demand, the state of distribution technology and the use of the distribution network by other attaching entities. An electric utility will place poles that allow it to accommodate all foreseeable increased power needs. Thus, while there may be instances where the electric utilities are placing higher voltage lines on their distribution poles, the Electric Utilities are able to generally accommodate these lines within the 7'6" of space allocated to them. To the extent that high voltage lines cause an electric utility to replace a pole, this is usually the result of an error in planning or the occurrence of an unforeseeable event, both of which are rare.^{21/}

XIII. The 40 Inch Safety Space Should Be Allocated To Unusable Space Or To Communications And Cable Attachments

The 40 inch zone between communications or cable facilities and electric conductors is required solely due to the presence of the telecommunications or cable facilities. When electric utilities occupy poles without any telecommunications or cable facilities, the 40 inch

^{21/} The Electric Utilities also designed their conduit systems with enough space to accommodate future growth in demand for electric service. The original projections on which these utilities constructed their systems, however, may be in jeopardy if the FCC requires the electric utilities to use critical reserve conduit space for telecommunications and cable attachments.

safety space is not required. The instant a telecommunications or cable facility is placed on the electric utility's pole, the 40 inch space must be included on the pole. By this simple statement, it is clear that it is only the presence of a telecommunications or cable company that can cause the electric utility to give up pole space that would otherwise be available for electric conductors.

For example, if an electric utility were to construct a pole infrastructure, there is enough space on a 30 foot pole to accommodate certain electric utility functions.^{92/} As is clear, there is no 40 inch safety zone in the absence of telecommunications or cable facilities. If the electric utility builds the same distribution infrastructure, but designs the system to allow for cable or telecommunications facilities, the electric utility must immediately add 40 inches of safety space plus one foot of usable space for each attaching entity. Thus, if only one attaching entity will attach to a pole, the electric utility would place a 35-foot pole.^{93/} When more than one attaching entity seeks space on a pole, the electric utility must increase the height of the pole to 40 feet. This is because poles can only be purchased in 5-foot increments and the addition of a second attaching entity causes the allocation of space to exceed 35 feet. The electric utility usually must also increase the class of the pole placed to accommodate the additional load demands. The difference in cost that the electric utility incurs to accommodate any pole attachments other than electric utility conductors can cause the cost of the pole to as much as double from the cost that the electric utility would otherwise incur if it was only required to install poles for its internal electric needs.

^{92/} See Exhibit 4.

^{93/} Id.

Finally, NCTA argues that the 40 inch safety space is a by-product of the NESC ground clearance requirement of 22 feet that electric utilities must meet for distribution conductors.^{94/} This statement is incorrect for two reasons. First, NESC Table 232-1, cited by NCTA, does not support NCTA's claim regarding the required ground clearance levels. Second, the minimum ground clearance for the electric conductor is not necessarily dispositive of this issue because many electric utilities attach a neutral conductor at a lower point on a pole. Indeed, the point of attachment for the neutral has the same ground clearance requirement as the cable attachment.^{95/} In addition, 40 inches of clearance space must be included between the neutral conductor and a cable or telecommunications facility that would not otherwise be required. The additional 40 inches of space causes the electric utility to have to raise the point of attachment for its distribution conductors to a level that exceeds the ground clearance that would be required if the cable attachment was not present. Accordingly, NCTA's argument that the 40 inch safety space is necessary in order for the distribution conductor to meet the highway clearance standards is fundamentally misplaced.

In light of the above, it is unjust and unreasonable that an electric utility is required to place a pole that is 33% taller and 100% stronger in order to accommodate two attaching entities when the utility is only allowed to recover 15% of the cost of the same pole. Placing the 40 inch safety zone in unusable space or allocating this space between telecommunications and cable attachers will more fairly allocate pole costs to the parties that cause the electric utility to incur such costs.

^{94/} Comments of the National Cable Television Association at 14.

^{95/} 1997 NESC, Table 232-1.

Time Warner argues also that the 40 inch space should be allocated to the electric utility because the electric utility makes use of the space through the placement of transformers and other equipment in the safety zone.^{96/} The investor-owned electric utilities subject to § 224 do not normally place transformers in the safety zone. The electric utility conductors and equipment were normally attached to the pole, to provide electricity to customers, before the cable company attached its facilities to the pole. In some instances, cable companies might be allowed to take advantage of an NESC provision that states that the minimum clearance between the bottom of a grounded piece of equipment and a telecommunications or cable facility is 30 inches.^{97/} However, because the electric utility is usually the first entity on a pole, it is either by choice or error on the part of the cable company to place its facilities less than 30 inches from the bottom of grounded equipment.^{98/} In this scenario, which represents the typical timing and order of the placement of pole attachments, it is difficult to see how the electric utility "acted" in any way to improperly "place" its equipment in the 40 inch safety zone.

As noted in the Comments filed by the Electric Utilities, the optimal solution is to allocate the 40 inch safety space to unusable space.^{99/} This approach is supported by

^{96/} Comments of Time Warner Cable at 15.

^{97/} 1996 NESC, Rule 239.

^{98/} To the extent that this practice occurs, under the Commission's current approach, the electric utility is subsidizing the cost of the cable attacher's use of the additional 10 inches of space. This presents another reason why the Commission must adopt the Electric Utilities' proposal to classify the 40 inch safety space as unusable or as communications space.

^{99/} Comments of AEP et. al. at Section VIII.C.2.a.i.

several parties^{100/} and will ensure that both telephone and electric utilities are able to recover the costs associated with poles that accommodate electric and telecommunications or cable attachments. However, the Electric Utilities would find equally acceptable the suggestion of the Electric Utility Coalition that this space be allocated to telecommunications and cable attachers as used space.^{101/}

XIV. The National Cable Television Association Mischaracterizes The Modifications Made To The NESC Vertical Clearance Requirements

Contrary to NCTA's statement in footnote 31 of its comments,^{102/} the NESC did not change the vertical ground clearance required for electric conductors from 18 feet in basic conditions to 15'6" in basic conditions. It simply changed the methodology for doing the clearance calculation.

Prior to 1990, the NESC recommended vertical clearances that were based on what was termed "basic conditions." In other words, 18 feet was the minimum vertical clearance necessary on an average day under normal operating conditions. However, the pre-1990 code also allowed the ground clearance minimum to be increased for conductors that ran over streets, roads, alleys and driveways (which describes most of the terrain where cable television and telecommunications attachments are made to electric utility poles) to account for factors such as wind, ice loading and operating temperatures. Taking these factors into

^{100/} See, e.g., Comments of Public Service Company of New Mexico at 6; SBC Communications Inc. at 35-38; Comments of Sprint Corporation at 3-4.

^{101/} Comments of the Electric Utilities Coalition at 33.

^{102/} Comments of National Cable Television Association at 11 & n.31.

account, the minimum clearance under the pre-1990 code was 15'6" under fully loaded conditions, as it is today.

As described in greater detail in Appendix A of the 1990 NESC, the NESC Clearances Subcommittee recognized that the clearance measurements were confusing and subject to misinterpretation. The Subcommittee thus changed the standard for vertical clearance measurement to 15'6" under worst-case conditions. This was not a change in clearance from 18' to 15'6", just a change in how vertical clearance is calculated. Appendix A of the 1990 Code specifically states that "[w]hile some clearance values may appear to be larger and some smaller, the net effective clearances of energized conductors and cables are essentially unchanged."^{103/}

Regardless of which method of calculation is used, NCTA's argument misses the point regarding vertical clearance. Whether the minimum clearance required from the conductor to grade is 15'6" under worst-case conditions, or 18' under best-case conditions, that does not equate to the height where entities must attach to the pole in order to achieve the required vertical clearances. A cable that spans the distance between two poles is not taut; it has a natural sag, and it is the lowest point of the sag that must meet the clearance requirements. It follows that if the lowest point of a cable is at 15'6" under worst-case conditions, the place where the cable is attached to the pole must be at some point considerably higher than 15'6".

This is exactly the argument put forth by the Electric Utilities. The attachment must be made to the pole at 19'8" in order to meet vertical clearance standards at the lowest point

^{103/} 1990 NESC, Appendix A.

of the span between the two poles on normal days, and 15'6" on worst-case days. The associated argument that an 18-foot minimum clearance equates to an 18-foot attachment height is incorrect and must be disregarded.

XV. Dual Side Attachments And Pole Brackets Can Present Safety And Operational Concerns

AT&T has stated that it is common practice for utilities to allow dual side attachments on poles, therefore, utilities should not be allowed to prevent attaching entities from using this technique in order to add facilities in their allocated one foot of space.^{104/} The Electric Utilities would like to ensure that the Commission understands that dual side attachments are not allowed by all electric utilities due to limitations presented by engineering, operations, design and safety practices. Some electric utilities do not allow dual side attachments because they interfere with the engineering requirement that a utility maintain enough unencumbered climbing space to ensure safe access to pole attachments by utility and attaching entity personnel.

In addition to the safety concerns, dual side attachments can also make pole replacement more difficult. When attachments are limited to one side of a pole, the utility is able to replace the pole without having to work between cables. In essence, the new pole is placed with all cables on one side and then the cables are attached to the new pole. When dual side attachments are present, the utility must implement additional procedures to allow it to replace the pole with energized conductors between cables. The complications presented

^{104/} Comments of AT&T Corporation at 6 & n.11.

by such an arrangement cause some utilities to follow engineering practices that do not allow dual side attachments. In instances where such attachments are allowed by a utility, the additional complexity related to pole placement can raise the make-ready costs of parties seeking attachment on poles already completely occupied.

Finally, the use of cantilevered pole brackets is not universally accepted. The Electric Utilities generally do not use cantilevered pole brackets except in instances when poles are not in alignment and brackets are necessary to allow a straight line attachment between poles. This practice is currently the norm because the use of cantilevered brackets can cause unequal distribution of weight on a pole, thus exacerbating loading issues. Cantilevered brackets can also limit safe and easy access to pole attachments.

XVI. Grounding Systems Must Be Included In The Electric Utility Ratebase

NCTA claims that electric utilities require cable operators to attach their facilities to the electric company ground, even though a cable company has installed its own grounding.^{105/} As a result, NCTA goes on to argue that because the grounding provided is not needed by the cable company, the cable company should not be required to pay for the presence of the grounding.^{106/} NCTA has misstated the reasons why electric utilities must be allowed to include grounding in the ratebase for pole attachments.

The NESC, the Communication Industry Manual for Outside Plant Construction and accepted engineering safety practices dictate that cable companies bond their facilities on

^{105/} Comments of National Cable Television Association at 19.

^{106/} Id.

poles. This is because cable and telecommunications facilities are conductors. Not all electric utilities mandate that attaching entities bond to electric utility bond wires. However, they do install and provide access to bond wire for that purpose in order to ensure compliance with all engineering and safety guidelines. If a cable company is able to fulfill its own business requirements by relying on the utility's grounding system, the electric utility should be allowed to charge for this service.

The Commission is incorrect in its statement that the costs of grounds are already included in the net cost of a bare pole.^{107/} The Commission has properly noted that such costs should be included, however, they are going uncollected by the Electric Utilities.

The Electric Utilities would rather have the cost of the grounding system included in the formula. However, should the Commission reject this recommendation, then it must stipulate that the electric utilities may charge for such attachments outside of the pole attachment rate formula. This alternative is appropriate because attachments to grounding would not be a pole attachment as defined in the Pole Attachments Act.

XVII. Adoption Of A Conduit System Formula Applicable To Electric Utilities Comprised Of Anything Other Than A Whole-Duct Methodology Will Lead To An Unjust And Unreasonable Conduit Attachment Rate

As discussed in the Comments filed by the Electric Utilities,^{108/} electric conductors are not compatible with communications facilities. Conductor size and safety and service concerns preclude the sharing of space with communications facilities. A half-, quarter-, or

^{107/} NPRM ¶ 18 and n.55.

^{108/} Comments of AEP et. al. at IX.B.3.

third-duct methodology is not appropriate for electric conduit systems. Once communications facilities are placed in a duct, the duct cannot be utilized for electric purposes.

A clear distinction must be made between telephone conduit systems and electric conduit systems. It is accepted that telephone conduit may be divided into innerducts. Therefore, something other than a whole-duct methodology may be appropriately applied to telephone conduit systems.^{109/} As a matter of NESC and sound engineering practices, however, telecommunications facilities and electric conductor cannot exist in the same duct. Once a duct in an electric conduit system is divided into innerducts or is used to carry telecommunications cable, the duct can no longer be used for electric purposes. The effect of subdividing an electric conduit system duct is to render it useless to the electric utility.

Given the above, applying something other than a whole-duct methodology to electric conduit systems is unreasonable. It would be unfair to the electric utilities and would prevent them from being fully compensated for the effective loss of a complete duct. For these reasons, once an electric conduit system duct contains even one communications cable, regardless of whether the duct is split into innerducts, the duct becomes completely used. As a result, the Commission cannot apply a half-duct methodology to attachments in electric utility conduit systems.

XVIII. Wireless Facilities Are Not Pole Attachments

At least one commenter, AT&T, argued that the Commission should use this proceeding to expand the definition of pole attachments to include the attachment of wireless

^{109/} Comments of SBC Communications Inc. at 27-29.

facilities to utility poles, ducts, conduit or right-of-way.^{110/} AT&T's proposal contradicts the plain language of § 224, the legislative history of § 224 and sound policy considerations. The language of the Pole Attachments Act and its legislative history unambiguously refer to wires on distribution facilities. Based on sound statutory analysis, the Commission is limited to regulating wire attachments to utility poles and conduit. In addition, as such, applying the Pole Attachments Act to wireless facilities makes no sense from a policy perspective in light of the myriad of potential antenna sites available to wireless providers.

A. The Historical Context And Legislative History Of The Pole Attachments Act, As Amended, Demonstrates That Congress Intended To Regulate Only The Attachment Of Wire Facilities

In 1978, Congress passed the Pole Attachments Act to protect cable television companies from alleged anticompetitive activities by telephone utilities, who, Congress believed, were exercising monopoly power over their "bottleneck" distribution infrastructure by charging excessive pole attachment rates.^{111/} The Senate Report accompanying the legislation explained that "owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing [utility] poles."^{112/}

^{110/} Comments of AT&T Corporation at 9-10.

^{111/} The history of the Pole Attachments Act is discussed in detail in the Electric Utilities' comments. See Comments of AEP et al. ¶¶ 47-48; see also Texas Utilities Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

^{112/} Texas Utilities Elec. Co. v. FCC, 997 F.2d at 932 (quoting S. Rep. No. 580, 95th Cong., 2d Sess. at 15, reprinted in 1978 U.S.C.C.A.N. 109, 123).

The statute enacted by Congress in 1978 clearly was intended to apply only to attachments of wire facilities. This reading of the 1978 statute has been universally accepted — by the utilities, by the telephone companies, by wireless providers, and by the Commission — and was not challenged by any party during the two decades of its operation.

The legislative changes to the Pole Attachments Act that eventually became § 703 of the Telecommunications Act of 1996 were developed against the background of expansion of the cable industry into the provision of telecommunications services.^{113/} In the absence of new legislation, the cable companies' competitors, principally competitive access providers ("CAPs"), would not be entitled to the same type of § 224 coverage for attachments of their fiber optic cable to utility infrastructure as cable companies. Congress, therefore, extended

^{113/} Proposed changes to the Pole Attachments Act were first introduced in the House and Senate telecommunications bills that were considered in 1993-94. H.R. 3636 (Introduced on November 11, 1993 and passed by the House of Representatives on June 28, 1994) and S. 1822 (Introduced on February 3, 1994, reported out of the Senate Committee on Commerce, Science, and Transportation on September 14, 1994, but never passed by the full Senate) both add the phrase "or [a] provider of telecommunications service" to the definition of "pole attachment," 47 U.S.C. § 224(a)(4). As amended, the definition of "pole attachment" from the 1994 Senate bill, S. 1822 (which is identical to the final version passed in 1996) reads as follows: The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. S. Rpt. No. 103-367, 103d Cong., 2d Sess. at 134. The 1994 Senate Report accompanying the legislation explains that the changes to the Pole Attachments Act, including the establishment of a new rate formula for attachments used to provide telecommunications services, are "intended to remedy the anomaly of current law, under which cable systems providing telecommunications services are able to obtain a regulated pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224." *Id.* at 65. The same thought is contained in the Conference Report on the final version of the 1996 Act, which notes that the House amendment "is intended to remedy the inequity of charges for pole attachments among providers of telecommunications services." Conf. Rpt. No. 104-458, 104th Cong., 2d Sess. at 206.